made by the executive director of Bank Pembangunan. A search at the Registry of Companies by counsel for the applicant as per his affidavit at encl 21 yielded two notices of appointment of the same receiver and manager by the respondent. The first (MSM-1) dated 15 March 1986 was signed by the executive director of Bank Pembangunan but the one dated 1 December 1986 (MSM-2) was signed by the chief executive. The deed of appointment at SJI of encl 8 is also signed by the said chief executive and not the executive director.

Learned counsel for the receiver and manager of the respondent had argued that no objection had been made over the one year the receiver and manager had been in possession and in any case the same receiver and manager had been appointed as such by the United Asian Bank on 16 December 1986. He also submitted that the appointer should be the only party to raise any objection. To that, learned counsel for the applicant had referred to MSM-1 and MSM-2 of encl 43 which were the appointments of the two attorneys for United Asian Bank which appointments did not include the power to appoint a receiver and manager as had been done vide SJII of encl 24. As such, he reiterated that even the appointment of the same receiver and manager by the United Asian Bank was void ab initio. Learned counsel for the applicant also referred to encl 14, which is still pending, where Bank Pembangunan themselves had applied for the release of the same goods under distress. With the actual debenture holder making the claim, counsel submitted that the receiver and manager as agent of the debenture holder cannot also claim. This, he added, demolishes the claim of counsel for the receiver and manager of the respondent that only the appointer can object to the appointment of the receiver and manager. He further stated that the fact that Bank Pembangunan themselves are making the claim after the purported appointment of the receiver and manager indicates that they themselves were seriously doubting the said appointment.

On these considerations, I accepted the contention that the receiver and manager had not been properly appointed in the circumstances. The application by the receiver and manager of the respondent was therefore dismissed with costs in the cause and because of the lengthy arguments I refused the application by counsel for the receiver and manager of the respondent to adjourn to open court for further arguments but granted an interim stay pending the appeal subject to the applicant applying to set aside the order for the stay.

Order accordingly.

Solicitors: *Murthi & Partners*; *Maxwell Kenion Cowdy & Jones.*

Reported by *Wong Kim Fatt*

Associated Tractors Sdn Bhd v PMB (Kulim) Sdn Bhd & Ors

HIGH COURT (KUALA LUMPUR) – CIVIL SUIT NO C23-2678-86
SITI NORMA YAAKOB J
19 AUGUST 1988

Civil Procedure – Summary judgment – Setting aside – Plaintiff's amended statement served on defendants' former solicitors – Change of solicitors for defendants – Whether non-service of amended statement of claim on new solicitors prejudiced defendants – Whether non-service made summary judgment irregular – Plea of defence on the merits – Not enough for defendants to merely refer to statement of defence without condescending to particulars

The first defendant executed an equipment lease agreement with one P. By a contract of guarantee, the second and third defendants guaranteed payment by the first defendant of all sums due under the lease. P later assigned all its rights and interests under the lease to the plaintiff. The first defendant defaulted on its monthly payments under the lease and an application for summary judgment was filed by the plaintiff and served on the defendants' solicitors. Before the hearing of the application, the plaintiff's new solicitors applied to amend the statement of claim. This application to amend was again served on the defendants' solicitors. On the day of the hearing, the defendants' solicitors were absent and summary judgment was entered against the defendants in the absence of their solicitors. In the present application to have the default summary judgment set aside, the defendants were represented by another set of solicitors. They relied on two grounds to support their application: (a) there was no service of the amended statement of claim on them and (b) there were merits on their defence.

Held, dismissing the application:

(1) The court does not consider that non-service alone has prejudiced the defendants in any way as a copy of the proposed amended statement of claim (which was no different from the amended statement of claim) had been served on the defendants' former solicitors together with the plaintiff's application for amendment. The non-service does not make the judgment any less regular.

(2) It is not enough for the defendants to merely refer to the statement of defence without condescending to particulars to support their contention that they have merits in their defence. The court could not place any reliance on the defendants' averments in their statement of defence, which had been pleaded and filed ten months after the first defendant's letter of admission was issued. (The letter was written by the first defendant wherein it was admitted that it was far behind in its payments under the lease and it was prepared to pay the plaintiff $50,000 per month.)

[*Editorial Note*: The defendants have appealed to the Supreme Court vide Civil Appeal No 291 of 1988.]

Sa Ponmugam for the defendants/applicants.
KS Low for the plaintiff/respondent.

Cur Adv Vult

Siti Norma Yaakob J: The plaintiff's claim is founded on an equipment lease agreement ('the lease') dated 29 July 1982 executed by the first defendant with one PHB

Credit Sdn Bhd. Pursuant to a contract of guarantee dated 29 July 1982, the second and third defendants guaranteed payment by the first defendant of all sums due under the lease and any variations thereto as well as the due observance and performance by the first defendant of all the conditions and stipulations contained in the lease.

On 30 June 1983, the terms and conditions relating to the payments of the sums due under the lease were varied by the first defendant entering into a variation agreement with PHB Credit. This was later followed by PHB Credit assigning all its rights and interests under the lease to the plaintiff. This deed of assignment was executed on 30 September 1985 with due notice given to the second and third defendants. When it was discovered that the lease was mistakenly described as a hire-purchase agreement in the deed of assignment, a fresh deed of assignment was executed on 10 July 1985 and notice of this was also conveyed to the second and third defendants.

Under the lease, the first defendant was to make a monthly payment of $25,119.60 as rentals for the crushing and screening plant leased to it, but it only managed to make 16 rental payments and thereafter defaulted. The present action is therefore to recover all sums due under the lease, by way of overdue rentals, the balance of the residual value of the plant, overdue interest calculated up to 30 April 1986, with further interest calculated after that date, damages for wrongful detention of the plant and costs.

From the outset of the suit the defendants were represented by M/s Murthi & Partners, and they entered the memorandum of appearance and filed the statement of defence on behalf of all the defendants.

An application for summary judgment under O 14 was filed by the plaintiff and served on the defendants' solicitors on 21 February 1987. The application was fixed for hearing on 4 September 1987 but following a request for an adjournment by the plaintiff's solicitors on the ground that they have just been retained to take over the matter from the plaintiff's previous solicitors, the hearing was postponed to 25 November 1987.

However, before the hearing of the O 14 application, the plaintiff's new solicitors filed an application to amend the statement of claim which has already been amended once by the plaintiff's former solicitors. This application to amend was again served on the defendants' solicitors, M/s Murthi & Partners on 7 November 1987 but when the application was heard on 13 November 1987, only the plaintiff's solicitors were present and the application for amendment was granted in the absence of both the defendants and their solicitors.

On 25 November 1987, when the application for O 14 was heard, the defendants' solicitors were again absent, and summary judgment was entered against the defendants in the absence of their solicitors.

In the present application to have the default summary judgment set aside, the defendants are represented by M/s Ponmugam & Co, but there is no record in the file when they took over from M/s Murthi & Partners as there is no notice of change of solicitors filed. In any event they filed the application on 15 June 1988, well after six months after summary judgment had been entered against the defendants.

The defendants rely on two grounds to support their application:

(1) there is no service of the amended statement of claim on them;
(2) they have merits on their defence.

It is not disputed that the plaintiff had not served the amended statement of claim on the defendants after the amendments were granted, although a copy of it was filed in court on 27 January 1988. Be that as it may, I do not consider that non-service alone has prejudiced the defendants in any way as a copy of the proposed amended statement of claim had been served on the defendants' former solicitors together with the plaintiff's application for amendment. It must be stressed here that what was objectionable was not the amendments to the statement of claim but service of the amended statement of claim after amendments were granted. Since the amended statement of claim is no more different from the proposed amended statement of claim that was served on the defendants' former solicitors, I had considered that non-service does not make the judgment any less regular.

Since the effect of the instant application was to have the O 14 application heard afresh, I had considered that it was more pertinent for the defendants to show why they or their former solicitors were absent at the hearing on 25 November 1987. No reason is disclosed in their affidavit as to their absence or the absence of their solicitors and from the court file, M/s Murthi & Partners seemed to have abandoned them after filing the memorandum of appearance and statement of defence and counterclaim. In any event, the defendants could have succeeded if they had shown that they have merits on their defence.

Their statement of defence as filed by their former solicitors contains general denials and an averment that the assignment is null and void and inoperative. They also plead that the plant that was installed by the plaintiff was not of merchantable quality as it was not able to produce the required output as represented by the plaintiff as a result of which the defendants suffered losses from the shortfall in production as well as losses for

effecting repairs and maintenance to the plant which should have been done by the plaintiff. The defendants then set off their losses of actual profits and future earnings, repair and maintenance charges against the plaintiff's claim.

I do not consider that it is enough for the defendants to merely refer to the statement of defence without condescending to particulars to support their contention that they have merits in their defence. This is particularly so where the plaintiff has exhibited a letter dated 23 December 1985 written by the first defendant wherein it admitted it was far behind in its payments under the lease but all the same in consideration of their long business relationship it was prepared to pay the plaintiff $50,000 per month with effect from January 1986. By its letter dated 17 January 1986, the first defendant made one payment of $50,000 but defaulted after February 1986. In view of the clear admission of the amounts due under the lease as expressed by the first defendant, I could not place any reliance on the defendants' averments in their statement of defence, which had been pleaded and filed ten months after the letter of admission was issued. In view of this, I had ruled that since the defendants had failed to show any merits on the defence or counterclaim, I had accordingly dismissed their application with costs.

Application dismissed.

Solicitors: *Ponmugam & Co*; *Low & Tan*.

Reported by *Ng Sheau Jiuan*

Mohan a/l Paramsivam v Sepang Omnibus Company Sdn Bhd

HIGH COURT (KUALA LUMPUR) – ORIGINATING SUMMONS NO D2-31-42-88
SITI NORMA YAAKOB J
11 AUGUST 1988

Companies and Corporations – Share transfer of additional 15,000 shares – Application for registration of – Directors' refusal to register share transfer – Bumiputra equity in company reduced if share transfer acceded to – Refusal was made for sole purpose of endorsing government's bumiputra policy – Whether directors' discretion to refuse transfer was made mala fide – Companies Act 1965, s 162(2)

The applicant was a shareholder in the respondent company and requested to have another lot of 15,000 shares transferred into his name. At the board meeting of the respondent company, the board unanimously decided to reject it as a transfer would affect the bumiputra equity in the company. Aggrieved by this refusal, the applicant sought the court's discretion under s 162(2) of the Companies Act 1965 to rectify the register of members of the respondent by registering his name as the holder of another 15,000 shares.

Held, dismissing the application:

The directors' refusal to register the share transfer in the applicant's name was based on the composition of the shareholders and the percentage of their holdings as bumiputras and non-bumiputras. A transfer of another 15,000 shares from a bumiputra shareholder to a non-bumiputra would further reduce the bumiputra equity in the respondent company and such a refusal was made for the sole purpose of endorsing the government's policy to encourage active bumiputra participation in private businesses such as the ones carried on by the respondent company. It cannot therefore be said that the directors had exercised their decision mala fide.

Case referred to

1 *Kesar Singh* v *Sepang Omnibus Co Ltd* [1964] MLJ 122 (folld)

Legislation referred to

Companies Act 1965 s 162(2)
Rules of the High Court 1980 O 41 rr 3, 4

K Ravindran for the applicant.
Pretam Singh for the respondent.

Cur Adv Vult

Siti Norma Yaakob J: The applicant is a shareholder in the respondent company with 1,500 units of shares registered in his name. On 2 November 1987 he applied to have another lot of 15,000 shares, which he had purchased from a director of the respondent company, transferred into his name. At the board meeting of the respondent company, held on 20 December 1987, the applicant's request was discussed and the board unanimously decided to reject it as a transfer would affect the bumiputra equity in the company. Aggrieved by this refusal, the applicant now seeks the court's discretion under s 162(2) of the Companies Act 1965 to rectify the register of members of the respondent company by registering his name as the holder of another 15,000 shares in the respondent company.

In refusing to register the shares, the directors were acting under art 30(b) of the articles of association which reads as follows:

> 30 The right of members to transfer their shares shall be restricted as follows:
>
> (b) ...
>
> (c) The directors may in their absolute and uncontrolled discretion refuse to register any proposed transfer of shares.

This is not the first time that the court has been asked to determine the full extent of the operation of art 30(b), for in 1964, the same article was before Ismail Khan J, as he then was, in *Kesar Singh* v *Sepang Omnibus Co Ltd*[1] when similar proceedings were preferred by another aggrieved party against the same respondent. In that case the judge held that once the directors have stated on oath that they